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06 UNITED STATES DISTRICT COURT
07 WESTERN DISTRICT OF WASHINGTON
08 AT SEATTLE

09 KRIS CARLSON,) CASE NO. C05-1123-RSM
10)
11 Plaintiff,)
12)
13 v.) REPORT AND RECOMMENDATION
14) RE: SOCIAL SECURITY
15 JO ANNE B. BARNHART,) DISABILITY APPEAL
16 Commissioner of Social Security)
17)
18 Defendant.)
19 _____)

20 Plaintiff Kris Carlson proceeds through counsel in her appeal of a final decision of the
21 Commissioner of the Social Security Administration (Commissioner). The Commissioner denied
22 plaintiff's application for Supplemental Security Income (SSI) benefits after a hearing before an
Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record
(AR), and all memoranda of record, it is recommended that this matter be REMANDED for
further administrative proceedings.

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01 **FACTS AND PROCEDURAL HISTORY**

02 Plaintiff was born on XXXX, 1961.¹ She completed high school and some college course
03 work. Plaintiff previously worked as an accounts receivable clerk, typist, nurse's assistant, and
04 graphic designer. She applied for SSI on March 30, 2000, alleging disability since May 1988 or
05 June 1, 1997 due to an autonomic/norepinephrine deficiency causing dizziness, fainting, trouble
06 breathing, and weakness. (AR 66, 90, 99.)² Her application was denied initially and on
07 reconsideration, and she timely requested a hearing.

08 ALJ Arthur Joyner held a hearing on July 8, 2002, taking testimony from plaintiff,
09 vocational expert William Weiss, medical expert Dr. Arthur Anderson, and witness Carol Patton.
10 (AR 442-95.) He issued a decision finding plaintiff not disabled on September 13, 2002. (AR
11 347-57.)

12 Plaintiff timely appealed and the Appeals Council granted her request for review on March
13 28, 2003, vacating the ALJ's decision and remanding the case for a new hearing. (AR 361-64.)
14 The Appeals Council noted that the ALJ failed to state what weight he afforded the opinions of
15 Dr. Daniel C. Brown, plaintiff's treating physician, that the decision did not contain adequate
16 rationale for rejecting that physician's opinions, and that it had received clarification of plaintiff's
17 condition from Dr. Brown in connection with the request for review. The Appeals Council also
18 addressed the ALJ's treatment of Dr. Kerry T. Bartlett, noting that the ALJ rejected his opinions

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20 ¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with the
General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the
official policy on privacy adopted by the Judicial Conference of the United States.
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22 ² Two previous applications for benefits, filed on October 10, 1996 and October 28, 1997,
were denied at the initial level and not appealed, and are no longer at issue.

1 because he is not a treating source and because he was not convinced that Dr. Bartlett was aware
2 of the definitions of the terms “marked” and “constant” as used in forms completed by that
3 physician. The Appeals Council stated that Dr. Bartlett’s opinions must be considered as coming
4 from an acceptable medical source and that he should have been contacted for clarification on the
5 issue of terminology. Finally, the Appeals Council noted that, although the ALJ found plaintiff’s
6 affective disorder severe, he did not include any mental limitations in his residual functional
7 capacity (RFC) assessment. The Appeals Council directed the ALJ to give further consideration
8 to plaintiff’s treating and examining sources, to obtain additional evidence concerning her
9 impairments, to further evaluate her mental impairments in accordance with the special technique
10 described in 20 C.F.R. 416.920a, to give further consideration to her RFC, and, if warranted by
11 the expanded record, to obtain additional vocational expert testimony.

12 ALJ Joyner held a second hearing on February 17, 2004, taking testimony from plaintiff,
13 vocational expert Stephen Van Houten, and medical experts Dr. Robert Aigner and R. Thomas
14 McKnight. (AR 496-527.) He thereafter held a supplemental hearing on May 5, 2004, taking
15 additional testimony from Dr. Anderson. (AR 528-37.).

16 The ALJ issued a second unfavorable decision on July 31, 2004. (AR 14-23.) Plaintiff
17 appealed the ALJ's decision and, on May 25, 2005, the Appeals Council denied plaintiff's request
18 for review. (AR 4-6.) Plaintiff appealed this final decision of the Commissioner to this Court.

JURISDICTION

20 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

DISCUSSION

22 The Commissioner follows a five-step sequential evaluation process for determining

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01 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must
02 be determined whether the claimant is gainfully employed. The ALJ found plaintiff had engaged
03 in substantial gainful activity from October 1988 until June of 1997, but not after that point. At
04 step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ
05 found plaintiff's syncope (fainting) and personality disorder severe. Step three asks whether a
06 claimant's impairments meet or equal a listed impairment. The ALJ found that plaintiff's
07 impairments did not meet or equal the criteria for any listed impairments. If a claimant's
08 impairments do not meet or equal a listing, the Commissioner must assess RFC and determine at
09 step four whether the claimant has demonstrated an inability to perform past relevant work. The
10 ALJ found plaintiff able to perform her past relevant work as a graphic designer. If a claimant
11 demonstrates an inability to perform past relevant work, the burden shifts to the Commissioner
12 to demonstrate at step five that the claimant retains the capacity to make an adjustment to work
13 that exists in significant levels in the national economy. The ALJ also found plaintiff not disabled
14 at step five, finding she could perform other work existing in significant numbers in the national
15 economy, including work as an assembler.

16 This Court's review of the ALJ's decision is limited to whether the decision is in
17 accordance with the law and the findings supported by substantial evidence in the record as a
18 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more
19 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable
20 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750
21 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's
22 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.

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01 2002).

02 Plaintiff argues that the ALJ failed to assess all of her severe impairments at step two,
 03 failed to adhere to the Appeals Council's order on remand and to provide legally sufficient reasons
 04 for rejecting the opinions of treating and examining physicians, and erred at all subsequent steps
 05 of the disability evaluation, including the assessment of her credibility. She asks that the Court
 06 remand this matter for an award of benefits or, alternatively, for further administrative
 07 proceedings. The Commissioner argues that the ALJ's decision is supported by substantial
 08 evidence and should be affirmed.

09 The Court has discretion to remand for further proceedings or to award benefits. *See*
 10 *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). The Court may direct an award of benefits
 11 where "the record has been fully developed and further administrative proceedings would serve
 12 no useful purpose." *McCartey v. Massanari* 298 F.3d 1072, 1076 (9th Cir. 2002).

13 Such a circumstance arises when: (1) the ALJ has failed to provide legally sufficient
 14 reasons for rejecting the claimant's evidence; (2) there are no outstanding issues that
 15 must be resolved before a determination of disability can be made; and (3) it is clear
 16 from the record that the ALJ would be required to find the claimant disabled if he
 17 considered the claimant's evidence.

18 *Id.* at 1076-77. For the reasons described below, the undersigned recommends that this matter
 19 be remanded for further administrative proceedings.

18 Step Two

19 At step two, plaintiff must make a threshold showing that her medically determinable
 20 impairments significantly limit her ability to perform basic work activities. *See Bowen v. Yuckert*,
 21 482 U.S. 137, 145 (1987) and 20 C.F.R. § 416.920(c). "Basic work activities" refers to "the
 22 abilities and aptitudes necessary to do most jobs." 20 C.F.R. § 416.921(b). "An impairment or

01 combination of impairments can be found ‘not severe’ only if the evidence establishes a slight
 02 abnormality that has ‘no more than a minimal effect on an individual’s ability to work.’” *Smolen*
 03 v. *Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (quoting Social Security Ruling (SSR) 85-28).
 04 “[T]he step two inquiry is a de minimis screening device to dispose of groundless claims.” *Id.*
 05 (citing *Bowen*, 482 U.S. at 153-54). An ALJ is also required to consider the “combined effect”
 06 of an individual’s impairments in considering severity. *Id.*

07 In this case, the ALJ found only plaintiff’s personality disorder and syncope severe. (AR
 08 19.) He did not find that she had a somatoform disorder or affective disorder causing her more
 09 than minimal limitations in her ability to perform work related activity, stating:

10 While Dr. Bartlett has twice indicated that she has this diagnosis, neither Dr. [David]
 11 Sandvik nor Dr. [Anselm] Parlatore assessed a somatoform disorder. These
 12 psychiatrists characterized her impairments more in terms of a personality disorder
 13 than a somatoform disorder. The diagnosis of a somatoform disorder is only
 14 appropriate if a physical impairment has been ruled out. Dr. [Daniel] Brown, the
 15 claimant’s treating physician seems to feel that the claimant has a physical impairment.
 16 While I am ruling out a somatoform disorder, I am accepting that the claimant has
 17 episodes of syncope and near-syncope.

18 (Id.)

19 Noting that he previously found her asthma and an affective disorder (depressive order)
 20 severe (*see* AR 354), plaintiff first notes that the ALJ failed to provide any explanation for not
 21 finding as such in his July 2004 decision. She asserts that, despite evidence of asthma-related
 22 restrictions in the record (*see, e.g.*, AR 280), the ALJ failed to consider this condition at either
 step two or step four. Plaintiff also points to evidence supporting the existence of a depressive
 syndrome. (*See* AR 202 (Psychiatric Review Technique Form (PRTF) by Drs. Janis Lewis and
 Thomas Clifford in which a depressive syndrome was evaluated under Listing 12.04); AR 191 (Dr.

01 Bartlett found suggestion of depressive symptomology on psychological testing); AR 409, 412
02 (Dr. Sandvik diagnosed dysthymia and various moderate limitations)). She notes that, while the
03 ALJ stated that he did not accept the existence of an affective disorder, he gave no reasons
04 germane to such a disorder, asserting instead only reasons pertaining to a somatoform disorder.
05 Plaintiff adds in a footnote that the ALJ failed to properly consider her lumbar spine impairment,
06 pointing to X-rays and evidence of chronic cervical pain. (*See* AR 217, 225, 227.)

07 Plaintiff next argues that the ALJ incorrectly stated that a somatoform disorder diagnosis
08 is appropriate only if a physical impairment has been ruled out. She asserts that this disorder
09 entails the presence of physical symptoms that suggest a general medical condition, but which are
10 not fully explained by the general medical condition. *See* Diagnostic and Statistical Manual of
11 Mental Disorders, 4th ed. at 445. *See also* 20 C.F.R. 404, Subpart P, App. 1, Listing 12.07
12 (defining a Somatoform disorder as: "Physical symptoms for which there are no demonstrable
13 organic findings or known physiological mechanisms.") Plaintiff argues that her autonomic
14 insufficiency diagnosis does not fully account for the symptoms she experiences, and points to
15 evidence in the record supporting the existence of this condition. (*See* AR 192 (Dr. Bartlett
16 diagnosed undifferentiated somatoform disorder, noting it "reflects a presentation involving a level
17 of social or occupational impairment due to medical concerns that it is in excess of what would
18 typically be expected on the basis of the objective medical findings."); AR 409 (Dr. Sandvik
19 diagnosed a personality disorder and noted "[s]he appears to be of a psychological disposition to
20 represent physical problems" from her personality disorder features); AR 280 (Drs. Coral Hilby
21 and Guthrie Turner stated "psychosomatic illness may be related to integrative control of the
22 autonomic nervous system" on a Physical RFC Assessment (PRFCA)); AR 506-07 (medical expert

01 Dr. R. Thomas McKnight assessed plaintiff under Listing 12.07 (somatoform disorder). Plaintiff
02 further argues that the basis proffered for rejecting this diagnosis is belied by the ALJ's other
03 statements questioning the basis for her syncope episodes, or, in other words, the existence of any
04 physical condition in the first place. (*See* AR 19 (finding plaintiff's syncope severe, but not finding
05 a basis for her syncope; pointing to testimony from medical expert Dr. Arthur Anderson as to the
06 insufficiency of the evidence supporting the existence of idiopathic autonomous insufficiency.))

07 Finally, plaintiff argues that the ALJ failed to adhere to the Appeals Council's directive to
08 re-evaluate her mental impairments in accordance with the special techniques set forth at 20 C.F.R.
09 § 416.920a, requiring assessment in four essential areas of functioning: activities of daily living;
10 social functioning; concentration, persistence, and pace; and episodes of decompensation. She
11 asserts that, because the ALJ failed to include her affective disorder and somatoform disorder in
12 the evaluation, the step two finding is per se erroneous. *See Gutierrez v. Apfel*, 199 F.3d
13 1048,1050-51 (9th Cir. 2000) (remanding case where there was a colorable claim of mental
14 impairment and the ALJ failed to complete a psychological review technique form pursuant to 20
15 C.F.R. § 404.1520a).

16 The Commissioner responds that plaintiff's asthma argument is moot because the ALJ
17 found she could perform jobs with environmentally benign conditions and because her asthma
18 would not preclude her performance of those jobs. *See* Dictionary of Occupational Titles (DOT)
19 141.061-018 (graphic designer) and DOT 734.687-018 (assembler). She further argues that
20 plaintiff has not shown her depression caused any functional limitations precluding her ability to
21 perform the unskilled job of assembler, noting unskilled work involves simple tasks, working
22 primarily with objects more than people. *See* 20 C.F.R. § 416.968(a) (defining unskilled work as

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01 “work which needs little or no judgment to do simple duties that can be learned on the job in a
 02 short period of time.”); SSR 85-15 (stating unskilled jobs “ordinarily involve dealing primarily with
 03 objects, rather than with data or people”). The Commissioner adds that the State agency
 04 reviewing psychologists, Drs. Lewis and Clifford, concluded plaintiff could work despite her
 05 depressive disorder (*see AR 275*), and asserts that adding limitations from depression would not
 06 have changed the outcome of the decision.

07 The Commissioner argues that the ALJ properly rejected plaintiff’s alleged somatoform
 08 disorder based on the opinions of examining physicians Drs. Parlatore and Sandvik. *See*
 09 *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001) (“Although the contrary opinion of a
 10 non-examining medical expert does not alone constitute a specific, legitimate reason for rejecting
 11 a treating or examining physician’s opinion, it may constitute substantial evidence when it is
 12 consistent with other independent evidence in the record.”) With respect to a spine impairment,
 13 the Commissioner notes that examining physician Janice Pearl, M.D., noted normal orthopedic
 14 findings and stated plaintiff could perform sedentary work (AR 402-06), work consistent with that
 15 identified by the vocational expert (AR 523-24). Finally, the Commissioner asserts that the ALJ
 16 properly analyzed each category of functioning pursuant to 20 C.F.R. § 416.920a. (*See AR 19-*
 17 *20.*)

18 With the exclusion of the alleged spine impairment, for which there is little support,
 19 plaintiff demonstrates multiple errors at step two. First, as described above by plaintiff, there is
 20 ample support in the record supporting the existence of a severe somatoform disorder. The mere
 21 absence of a diagnosis of this condition from examining physician Dr. Sandvik is not compelling
 22 in the face of that evidence. It is similarly not particularly compelling that Dr. Parlatore, in January

01 2001, noted that although Dr. Bartlett had entertained the diagnosis of a somatoform disorder he
02 "at present" only had evidence and an impression of an adjustment disorder. (AR 198.)
03 Additionally, the ALJ's take on somatoform disorders appears inaccurate. As defined in the
04 Merck Manual of Diagnosis and Therapy, and argued by plaintiff, somatoform disorders are
05 "characterized by physical symptoms that suggest but are not fully explained by a physical
06 disorder[.]" *See* www.Merck.com (definition of Somatoform Disorders). Accordingly, a physical
07 impairment need not be ruled out.

08 Second, plaintiff correctly notes that the ALJ does not address why he no longer
09 considered her affective disorder severe. (*See* AR 19.) The Commissioner unconvincingly poses
10 an ad hoc argument regarding simple tasks and working primarily with objects, rather than people.
11 Moreover, the fact that the reviewing psychologists found she could work despite her depressive
12 disorder does not necessarily support that it was not severe. While it may well be that plaintiff
13 could perform the identified jobs despite her depressive disorder, the ALJ should explicitly address
14 the issue given the evidence in the record supporting the severity of this condition. *See also* SSR
15 85-15 ("The basic mental demands of competitive, remunerative, unskilled work include the
16 abilities (on a sustained basis) to understand, carry out, and remember simple instructions; to
17 respond appropriately to supervision, coworkers, and usual work situations; and to deal with
18 changes in a routine work setting.") On the other hand, the failure to address plaintiff's asthma
19 may indeed be harmless given the jobs identified. However, for the purpose of clarity, the ALJ
20 should also address this issue on remand.

21 Third, given the above-described errors, the ALJ should reassess plaintiff's mental
22 impairments pursuant to 20 C.F.R. § 416.920a. While the ALJ did appropriately assess the

01 categories of functioning, a reassessment of plaintiff's somatoform and affective disorders may
 02 well implicate that assessment.

03 Finally, plaintiff appears to raise an additional step two argument in her reply as to the
 04 existence and severity of a right bundle branch block ("RBBB"). As discussed further below, the
 05 ALJ discounted the existence of such a condition in his credibility assessment and plaintiff points
 06 to evidence supporting the existence of such a condition. Although the Court need not address
 07 arguments first raised in reply, the ALJ should specifically address this condition at step two on
 08 remand in the interest of rendering a thorough decision.

09 Physicians' Opinions and Appeals Council's Remand

10 In general, more weight should be given to the opinion of a treating physician than to a
 11 non-treating physician, and more weight to the opinion of an examining physician than to a non-
 12 examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not contradicted
 13 by another physician, a treating or examining physician's opinion may be rejected only for "clear
 14 and convincing" reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)).
 15 Where contradicted, a treating or examining physician's opinion may not be rejected without
 16 "specific and legitimate reasons" supported by substantial evidence in the record for so doing."
 17 *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). Where the opinion
 18 of the treating physician is contradicted, and the non-treating physician's opinion is based on
 19 independent clinical findings that differ from those of the treating physician, the opinion of the
 20 non-treating physician may itself constitute substantial evidence. *See Andrews v. Shalala*, 53 F.3d
 21 1035, 1041 (9th Cir. 1995). It is the sole province of the ALJ to resolve this conflict. *Id.*

22 As noted above, the Appeals Council noted that the ALJ failed to state what weight he

afforded the opinions of Dr. Brown, plaintiff's treating physician, and failed to give adequate reasons for rejecting those opinions. It further directed the ALJ to consider the opinions of Dr. Bartlett as coming from an acceptable medical source and noted he should have contacted that physician for clarification on the issue of terminology to the extent he was confused about that physician's understanding of the terminology.

Plaintiff argues that, although acknowledging the directive of the Appeals Council and recounting his history of treatment, the ALJ again fails to explain what weight, if any, he gave the opinions of Dr. Brown. (*See AR 16-19.*) Plaintiff next asserts that the ALJ failed to recontact Dr. Bartlett for clarification, and failed to provide specific and legitimate reasons for rejecting this examining physician's opinions, instead proffering an insufficient conclusory reason. (*See AR 20 (“I have considered the statement from Dr. Bartlett, that the claimant’s mental impairments meet the requirements of several mental listings, but do not find this opinion supported by the record.”))* and *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988) (“To say that medical opinions are not supported by sufficient objective findings or are contrary to the preponderant conclusions mandated by the objective findings does not achieve the level of specificity our prior cases have required, even when the objective factors are listed *seriatim*. The ALJ must do more than offer his conclusions. He must set forth his own interpretations and explain why they, rather than the doctors’, are correct.”) (internal footnote omitted)). She criticizes the one reason the ALJ did give specific to Dr. Bartlett: “Dr Bartlett’s [Global Assessment of Functioning] GAF assessment is not consistent with his later MSS. His written report and his GAF suggest only moderate limitations, even though he indicated marked limitations in a questionnaire.” (AR 21.) Plaintiff notes that Dr. Bartlett’s written report stated that her GAF indicated “[s]erious impairment in social and

01 occupational functioning" (AR 192), consistent with a marked impairment. She notes that the ALJ
02 failed to obtain clarification of Dr. Bartlett's understanding of the terminology as advised by the
03 Appeals Council, and failed to give any reasons for rejecting Dr. Bartlett's underlying report.

04 Plaintiff also argues in a footnote that the ALJ's rejection of the opinions of Drs. Sandvik
05 and McKnight was legally deficient. She asserts that the ALJ mischaracterized her testimony in
06 concluding she was not as impaired as these doctors opined (*see* AR 20), and inappropriately
07 relied upon trivial daily activities such as maintaining manicured nails or going to church to
08 attempt to show her ability to function at work. *See Smolen*, 80 F.3d at 1284 n.7 (stating that,
09 although "the ALJ may reject a claimant's symptom testimony if the claimant is able to spend a
10 substantial part of her day performing household chores or other activities that are transferable to
11 a work setting[,]” the "Social Security Act does not require that claimants be utterly incapacitated
12 to be eligible for benefits, and many home activities may not be easily transferable to a work
13 environment where it might be impossible to rest periodically or take medication.") (citing *Fair*
14 v. *Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)).

15 The Commissioner asserts that the ALJ properly rejected Dr. Brown's opinion, stating it
16 was unsupported and contradicted by plaintiff's performance in a Christmas cantata and by Dr.
17 Pearl's opinion she could perform sedentary work. (AR 21.) She also asserts that the ALJ
18 appropriately pointed to daily activities contradicting Dr. Bartlett's assessment of marked
19 limitations, and the contradictory assessment of Drs. Parlatore and Sandvik. (AR 20-21.) She
20 further asserts that the ALJ provided the same acceptable reasons for rejecting Dr. McKnight's
21 testimony (*see id.*), and that the ALJ, in fact, credited Dr. Sandvik's opinion (AR 21) (noting Dr.
22 Sandvik assessed only mild limitations in functioning).

01 The Commissioner adds that she has not found controlling authority on whether this Court
02 has jurisdiction to consider the argument that the ALJ did not follow the Appeals Council's
03 remand instructions. *See Gabaldon v. Barnhart*, 399 F. Supp. 2d 1240, 1251 & n. 9 (D. N.M.
04 2005) (finding no jurisdiction to consider plaintiff's contentions regarding the ALJ's adherence
05 to the Appeals Council's remand order; noting disagreement in courts regarding this issue). She
06 notes that, in any event, the Appeals Council's May 25, 2005 denial of review indicates its
07 satisfaction with the ALJ's compliance with the remand order.

08 In her reply, plaintiff avers that the ALJ appeared to reject Dr. Brown's opinion that her
09 autonomic insufficiency was disabling and that her syncope would worsen in a work situation,
10 stating: "There are no treating records documenting this phenomenon and there is no medical
11 explanation as to why this would be the case." (AR 21.) Plaintiff argues that, to the contrary, Dr.
12 Brown's records show the basis for his diagnosis of autonomic insufficiency and the resulting
13 symptom of syncope, as well as his opinion that the syncope would increase with stress. (*See* AR
14 163, 268-69, 271-72 (letters from Dr. Brown describing diagnosis and treatment from as far back
15 as 1980), 394-99 (same, plus noting several episodes of employment have been limited by
16 reappearance of symptoms under periods of stress, and attaching documentation supporting
17 original diagnosis of autonomic insufficiency)). Plaintiff also argues that it was inappropriate to
18 reject this treating physician's opinion based on her performance in a Christmas cantata and that
19 a reliance on Dr. Pearl's opinion was specious given that the ALJ also rejected pertinent aspects
20 of Dr. Pearl's assessment.

21 Plaintiff rejects the Commissioner's jurisdictional argument, asserting that the ALJ "shall
22 take any action that is ordered by the Appeals Council and may take any additional action that is

01 not inconsistent with the Appeals Council's remand order." 20 C.F.R. § 404.979. With respect
 02 to Dr. Sandvik, plaintiff notes he found a significant personality disorder of narcissistic type and
 03 several moderate limitations, including in her ability to respond appropriately to work pressures.
 04 (AR 412.) Plaintiff adds that the ALJ's rejection of the somatoform disorder assessed by Drs.
 05 Bartlett and McKnight was inappropriate in light of his erroneous interpretation of that disorder,
 06 as described above.

07 The above-described errors at step two necessitate a further assessment of the physicians'
 08 opinions in this case. In particular, the ALJ should reassess any opinions touching on somatoform
 09 or affective disorders, including the opinions of Drs. Bartlett and McKnight.

10 The undersigned, however, is not convinced that the ALJ erred with respect to the
 11 opinions of Dr. Brown. The ALJ stated the following as to the cause of plaintiff's syncope:

12 The claimant has alleged orthostatic hypotension as the cause of her syncope. Dr.
 13 Anderson, a cardiologist who is also certified in vascular diseases, has noted that the
 14 claimant's autonomic nervous system dysfunction was successfully treated with
 15 medication. Her drop in blood pressure from sitting to standing is no longer present.
 16 He suggested that the claimant needed work hardening as she was out of condition.
 17 From a cardiology stand point there is no indication of any problem. Dr. Anderson
 18 specifically testified that the diagnosis of idiopathic autonomous insufficiency is not
 supported by the record. This condition is a vascular condition and the claimant's
 record simply does not support this diagnosis. He also noted that the claimant's
 medications would not cause her reported symptoms. He noted Dr. Brown
 documents the claimant's consistent complaints, but does not adequately explain the
 basis for her alleged symptoms. While I do not find the basis for her syncope, I do
 find that the claimant has syncope which is a severe impairment.

19 (AR 19.) The ALJ also later stated:

20 There are multiple opinions in the record that the claimant is disabled. Dr. Brown,
 21 who has been her treating doctor since she was a child, has opined that the claimant
 is disabled. He has stated that the claimant's syncopal episodes would prevent her
 22 from working, although he reports that medication has had a significant effect in her
 functionality so that she now only had an "occasional episode of near syncope." He

01 noted that she was able to care for her personal needs and house without particular
02 difficulty but stated that her syncope would increase if she tried to work. There are
03 no treating records documenting this phenomenon and there is no medical explanation
04 as to why this would be the case. The claimant has apparently been willing to perform
05 in a Christmas cantata, an activity that required standing and significant preparation,
06 and this did not increase her episodes of syncope, although she had problems with a
substance sprayed on the Christmas tree. Dr. Pearl felt that the claimant could do
sedentary work, although she said that the claimant could stand less than two hours
due to exhaustion. This limitation is probably due to the fact that she believed
claimant had a right bundle branch block, which would be the cause of the claimant's
alleged exhaustion.

07 (AR 21.)

08 Therefore, in not accepting the opinions of Dr. Brown as to plaintiff's autonomic
09 insufficiency and disability generally, the ALJ pointed to the testimony of Dr. Anderson, the
10 evidence of plaintiff's activity, and at least part of the opinions of examining physician Dr. Pearl.
11 Despite Dr. Brown's longstanding treatment of plaintiff, the ALJ's reasoning was sufficient. It
12 is also significant that the ALJ did at least accept the severity of the primary symptom of the
13 condition diagnosed by Dr. Brown. It is not otherwise necessary to address the issue of
14 compliance with the Appeals Council's remand order.

15 Plaintiff belatedly and briefly requests that the opinions of her physicians be credited as true
16 in her reply brief. "Where the Commissioner fails to provide adequate reasons for rejecting the
17 opinion of a treating or examining physician, [the Court credits] that opinion as 'a matter of law.'" *Lester*, 81 F.3d at 830-34 (finding that, if doctors' opinions and plaintiff's testimony were credited
18 as true, plaintiff's condition met a listing) (quoting *Hammock v. Bowen*, 879 F.2d 498, 502 (9th
Cir. 1989)). Crediting an opinion as a matter of law is appropriate when, taking that opinion as
21 true, the evidence supports a finding of disability. *See, e.g., Schneider v. Commissioner of Social
22 Sec. Admin.*, 223 F.3d 968, 976 (9th Cir. 2000) ("When the lay evidence that the ALJ rejected is

given the effect required by the federal regulations, it becomes clear that the severity of [plaintiff's] functional limitations is sufficient to meet or equal [a listing.]"); *Smolen*, 80 F.3d at 1292 (ALJ's reasoning for rejecting subjective symptom testimony, physicians' opinions, and lay testimony legally insufficient; finding record fully developed and disability finding clearly required). However, courts retain flexibility in applying this "crediting as true" theory." *Connett v. Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003) (remanding for further determinations where there were insufficient findings as to whether plaintiff's testimony should be credited as true). As stated by one district court: "In some cases, automatic reversal would bestow a benefits windfall upon an undeserving, able claimant." *Barbato v. Commissioner of SSA*, 923 F. Supp. 1273, 1278 (C.D. Cal. 1996) (remanding for further proceedings where the ALJ made a good faith error, in that some of his stated reasons for rejecting a physician's opinion were legally insufficient).

It is bothersome that the proceedings surrounding plaintiff's application for benefits have gone on for so long (since 2000). However, the record in this case nonetheless does not support a remand for an award of benefits. That is, even taking the opinions of plaintiff's physicians as true, the record does not necessarily support an award of benefits.

Credibility Assessment

Absent evidence of malingering, an ALJ must provide clear and convincing reasons to reject a claimant's testimony. *See Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001). *See also Thomas*, 278 F.3d at 958-59. In finding a social security claimant's testimony unreliable, an ALJ must render a credibility determination with sufficiently specific findings, supported by substantial evidence. "General findings are insufficient; rather, the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." *Lester*, 81

01 F.3d at 834. "We require the ALJ to build an accurate and logical bridge from the evidence to her
 02 conclusions so that we may afford the claimant meaningful review of the SSA's ultimate findings."
 03 *Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003). "In weighing a claimant's credibility, the
 04 ALJ may consider his reputation for truthfulness, inconsistencies either in his testimony or between
 05 his testimony and his conduct, his daily activities, his work record, and testimony from physicians
 06 and third parties concerning the nature, severity, and effect of the symptoms of which he
 07 complains." *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

08 In this case, the ALJ rendered the following credibility assessment:

09 I do not find the claimant credible. She states that she has multiple episodes of
 10 dizziness on a daily basis, but she continues to drive. She says that she cannot lift
 11 more than two pounds, but she does all the cooking for her family. Cooking is almost
 12 always going to involve lifting more than two pounds. She arrived at the hearing in
 13 a wheelchair, but admitted that a wheelchair has not been prescribed. She reports that
 14 she cannot sustain concentration, but she home schools her child. She has reported
 15 to doctors that she has a right bundle branch block when there is no indication that
 16 she has this.
 17

18 (AR 21.) The ALJ goes on to discount the medical opinions in the record supporting disability
 19 as quoted above, noting her cantata performance and, with respect to Dr. Pearl's opinion that she
 20 could stand less than two hours due to exhaustion, stating that that limitation was probably due
 21 to plaintiff's assertion that she had a RBBB. (*Id.*) The ALJ had also previously addressed
 22 plaintiff's various activities at step two, noting her ability to cook, home school her son, perform
 in a cantata, and her ability to knit and watch several hours of television. (AR 20.)

20 Plaintiff asserts that the ALJ's statement as to her driving is irrelevant given that her
 21 syncopal episodes have been medically documented. She rejects that either her driving or use of
 22 a wheelchair necessarily impugns her credibility. Plaintiff further rejects the reasoning as to

01 cooking, noting that the evidence shows she “cooks” mainly by supervising meal production from
02 a seated position, only chopping food with a food processor. (AR 454-55, 197.) Plaintiff
03 additionally points to evidence supporting the existence of a RBBB. See AR 350 (ALJ’s
04 September 2002 decision stating: “She had an EKG showing sinus rhythm and a right bundle
05 branch block.”); AR 256-58 (records from Dr. Brown as to RBBB). Finally, plaintiff argues that
06 her performance in a single cantata is not substantial evidence that she can perform full time work
07 and asserts a lack of information concerning her previous statement in a form that she: “Home
08 schools her son - (supervises him, no physical stuff).” (AR 111.) She asks in her reply that her
09 testimony be credited as true. *Lester*, 81 F.3d at 834 (“[W]here the ALJ improperly rejects the
10 claimant’s testimony regarding his limitations, and the claimant would be disabled if his testimony
11 were credited, ‘we will not remand solely to allow the ALJ to make specific findings regarding that
12 testimony.’ Rather, that testimony is also credited as a matter of law.”) (internal citations
13 omitted).

14 In response, the Commissioner notes that not all of an ALJ’s reasons for discrediting a
15 claimant must be upheld, so long as substantial evidence supports the ALJ’s credibility conclusion.
16 *Batson v. Commissioner of the Soc. Sec. Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004). For this
17 reason, the undersigned agrees with the Commissioner that the ALJ’s credibility assessment was
18 sufficient. In particular, the ALJ appropriately pointed to her driving and use of a wheelchair as
19 calling her testimony as to the extent of her limitations into question. Additionally, while there is
20 little information in the record as to home schooling, plaintiff had ample opportunity to correct her
21 own statement as to this activity. (See AR 111.) In any event, however, the previously identified
22 errors necessitate a reassessment of her credibility on remand.

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01 Remaining Steps of Disability Evaluation

02 Plaintiff argues that the above-described errors implicate the remaining steps in the
03 disability evaluation, including whether or not her impairments alone or in combination met a
04 listing at step three, the RFC determination, and the ALJ's conclusions at steps four and five.
05 Because of the errors described above, the undersigned agrees that the remaining steps in the
06 evaluation should be reconsidered on remand.

07 **CONCLUSION**

08 For the reasons described above, this matter should be REMANDED for further
09 administrative proceedings. A proposed order accompanies this Report and Recommendation.

10 DATED this 7th day of April, 2006.

11 
12 Mary Alice Theiler
13 United States Magistrate Judge